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Supreme Court, U.S.
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No. 07-1042

IN THE

Supreme Court of the United States

PATRICK LETT,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals For The Eleventh Circuit

PETITIONER PATRICK LETT'S SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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Even in the brief time since Petitioner filed his Reply, the split of authority surrounding "clear error" under Federal Rule of Criminal Procedure 35(a) has continued to deepen. Two more Circuits, the Sixth and the Seventh, have now joined the fray, each issuing opinions wrestling with the contours of "clear error." *See United States v. Clark*, __ F.3d __, 2008 WL 3844167 (7th Cir., Aug. 19, 2008); *United States v. Branch*, __ F.3d __, 2008 WL 3288304 (6th Cir., Aug. 12, 2008). These opinions, both of which reflect an understanding of "clear error" different from that adopted in the Eleventh Circuit here, show that this issue will continue to fester, and that the Court's intervention is necessary, sooner rather than later.

1. The Seventh Circuit's opinion in *Clark* deepens the split regarding the meaning of "clear error" under Rule 35(a) in a case involving an error concerning statutory sentencing ranges. In *Clark*, the sentencing judge—like Judge Steele here—initially sentenced the defendant based on an erroneous belief as to the applicability of a mandatory statutory minimum sentence. 2008 WL 3844167, at *2-3. When the government brought this error to the district court's attention, the district judge, like Judge Steele, acknowledged and corrected his error within Rule 35(a)'s seven-day window. *Id.* at *3.

In contrast to the Eleventh Circuit, however, the Seventh Circuit *affirmed* the corrected sentence, holding that a sentence based on an erroneous belief as to the applicability of a mandatory statutory minimum was "clear error" subject to correction under Rule 35(a). *Id.* at *5. In language directly applicable here, the Seventh Circuit went on to say:

> We emphasize that such mistakes might be made by either party—if a defendant did not realize at sentencing that he was *not* subject to a mandatory minimum sentence, but the court erroneously applied one, the defendant could make a motion for a corrected sentence within the seven-day time period.

Id. at *6.

The Seventh Circuit essentially described the case here. Lett "did not realize at sentencing that he was *not* subject to a mandatory minimum sentence, but the court erroneously applied one." *Id.* The court then corrected its error within seven days. The Eleventh Circuit, however, in direct conflict with *Clark's* language, held that Rule 35(a) did *not* authorize Judge Steele to correct a sentencing error stemming from his mistake as to the applicability of a statutory mandatory minimum sentence. (Pet. App. 21a.) And it reached that result notwithstanding its acknowledgment that Judge Steele's misunderstanding likely "caus[ed] the court to impose a sentence higher that it would have ***had it correctly gauged the law***." (*Id.* 17a (emphasis added).)

In short, the Seventh Circuit's understanding of Rule 35(a) is sharply at odds with the understanding reflected in the Eleventh Circuit decision below.

2. The Sixth Circuit has also contributed to the growing confusion regarding Rule 35(a) "clear error" with its opinion in *Branch*. There, Branch pleaded guilty to possessing cocaine with an intent to distribute. 2008 WL 3288304, at *2. At his sentencing

hearing, the court concluded that Branch was safety-valve eligible. *Id.* It based this conclusion on its belief that Branch's criminal record warranted treating him as though he had only one criminal history point, not the two points calculated pursuant to the guidelines and reflected in the Pre-Sentence Report (the safety valve is available only to defendants with one or fewer criminal history points, *see* 18 U.S.C. § 3553(f)). *Branch*, 2008 WL 3288304, at *2. The government filed a motion under Rule 35(a), claiming that the court erred in its criminal history point calculation. In response, the court concluded it had in fact erred, and increased the sentence to the mandatory minimum. *Id.* at *3.

The defendant appealed claiming, like the government here, that the district court "lacked authority to modify the previously imposed sentence" as the court's error, if any, was not sufficiently clear in light of post-*Booker* authorities. *Id.* at *7. The Sixth Circuit rejected the defendant's argument and found that the court had indeed committed clear error. Determining whether the district court had "clearly erred," however, required the Sixth Circuit to undertake a lengthy analysis of (1) how, if at all, *Booker* undercut a pre-*Booker* Sixth Circuit decision, *id.* at *8-9, and (2) how *Booker* and *Kimbrough* impacted the § 3553(f) safety valve, an issue on which it sought guidance from opinions in other circuits, *id.* at *9-11.

The Sixth Circuit's willingness to find "clear error" after this lengthy, detailed analysis stands in sharp contrast to the Eleventh Circuit's determination that it did not need to even *reach* the issue of *Booker*'s impact because "reasonable arguments can be made

on both sides of" the issue, and thus any error could not be "clear." (Pet. App. 18a.) And the divergence in clear error framework is further exemplified by the Sixth Circuit's willingness, unlike the Eleventh Circuit, to look to opinions from other Circuits in connection with that analysis. (*See id.* 19a (Eleventh Circuit dismissing reliance on opinion from another circuit to show "clear error" because the opinion "is not binding in this Circuit").)

As *Branch* and *Clark* show, the meaning of "clear error" under Rule 35(a) is a frequently recurring issue, and one on which the Circuits fundamentally disagree. Petitioner respectfully urges the Court to grant certiorari and address this important conflict.

3. Further demonstrating the need for review, both *Clark* and *Branch* illustrate yet again that it is the United States' "heads-I-win, tails-you-lose" litigation strategy that lies at the root of the confusion among the circuit courts, and also that the government can receive an unfair advantage from that confusion. The government seeks a narrow understanding of "clear error" in cases like the one here when the *defendant* is seeking correction that would *lower* his sentence, but advocates a broader understanding in cases like *Clark* and *Branch* when the *government* seeks a change that *increases* the original sentence. Bedrock principles of fairness demand a uniform approach to "clear error" under Rule 35(a), and Petitioner submits that this case presents an ideal vehicle for the Court to provide the necessary clarification.

Respectfully submitted,

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